Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1279

RALPH H. ARABIAN, et al
Petitioners,
v.

JOHN J. DALEY, et al

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported as RALPH H. ARABIAN, et al v. JOSEPH AYOUB, et al, Case no. 78-8119. The opinion of the United States District Court for the District of Massachusetts is reported as RALPH H. ARABIAN, et al v. JOHN J. DALEY, et al, Civil Action no. 75-446-G. Three orders of the Plymouth Probate Court of Plymouth County, Massachusetts are reported as RALPH H. ARABIAN v. PATRICIA M. ARABIAN, Case no. 20404,

and dated September 8, 1971, November 13, 1972, and December 8, 1972 respectively. The opinion of the Massachusetts Appeals Court is reported as ROBERT E. SCHLICHTE v. MARIE C. SCHLICHTE, Case no. AC 74-77. The order of the Norfolk Probate Court of Norfolk County, Massachusetts is reported as ROBERT E. SCHLICHTE v. MARIE C. SCHLICHTE, Case no. 28830 and dated August 8, 1973. A copy of each opinion is attached as Appendix A, and a copy of each order is attached as Appendix B.

JURISDICTION

This petition for Writ of Certiorari results from the order of the United States Court of Appeals for the First Circuit, entered on November 21, 1978, dismissing Petitioners' application for appeal. Petitioners submit this statement in support of the jurisdiction of the Supreme Court of the United States to hear this petition and to show that a substantial federal question is presented in this petition.

This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

This petition is taken by Petitioners in an effort to have certain Massachusetts statutes and rules (before the 1975 revisions) which authorize a court to award attorney's fees to women but not to men declared unconstitutional. Petitioners petition this Court from the order of the United States Court of Appeals for the First Circuit, which dismissed Petitioners' appeal. (Appendix A, p. 1a). By this order, the United States Court of Appeals for the First Circuit affirmed the judgment of the United

States District Court (Appendix A, p. 2a) which refused to rule on the validity of the statute and rule, governing attorney's fees in divorce actions in the face of Petitioners' constitutional challenge.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment XIV, providing in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Massachusetts Probate Court Rule 47 provides:

> "An application by a <u>wife</u> for an allowance to enable <u>her</u> to defend or prosecute a libel shall contain a statement that <u>she</u> intends in good faith to defend or prosecute such libel, and shall be accompanied by a certificate of <u>her</u> attorney that he believes such statement to be true. If such allowance is granted, it shall be paid as the court may direct."
> (emphasis added)

Massachusetts General Laws, Chapter 208, Section 17, prior to 1975 amendments read as follows:[1]

> "Pendency of libel; allowance; alimony. The court may require the husband to pay into court for the use of the wife during the pendency of the libel an amount to enable her to maintain or defend the libel, and to pay to the wife alimony during the pendency of the libel." (emphasis added)

QUESTION PRESENTED

The ultimate question presented is whether Massachusetts General Laws, Chap. 208, Sec. 17[1] and Massachusetts Probate Rule 47 are unconstitutional, as an invidious and arbitrary discrimination based on sex, and not rationally related to any constitutionally permissible government purpose. By the terms of the statute and rule, only a husband can be required to pay the wife's attorney's fees, but not the contrary. This distinction between men and women gives rise to petitioners' question. Specifically: Does the statute and rule violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by virtue of their absolute reliance on a gender-based

[1] MGLA Chap. 208, Sec. 17 underwent certain minor, technical changes in 1975 to eliminate all reference to sex. These changes have no bearing on the issues presented by this petition, as the orders were made prior to the 1975 amendment.

classification?

STATEMENT OF THE CASE

The proceedings against Petitioner Arabian began in Plymouth Probate Court of Plymouth County, Massachusetts, as an order against Arabian to pay his wife's attorney's fees, ordered on September 8, 1971 under the threat of imprisonment. Two subsequent orders were also filed on November 13, 1972 and December 8, 1972 respectively, (Appendix B, pp. 10a-12a). No previous agreements existed between the parties to pay the wife's attorney's fees.

The proceedings against Petitioner Schlichte began in Norfolk Probate Court of Norfolk County, Massachusetts, as an order against Schlichte to pay his wife's attorney's fees, ordered on April 4, 1973. A subsequent order was filed on August 8, 1973, (Appendix B, pp. 13a). No previous agreements existed between the parties to pay the wife's attorney's fees. Schlichte appealed to the Massachusetts Appeals Court which refused to rule on the constitutionality issue.

Petitioners Arabian and Schlichte properly raised the question of constitutionality of the Massachusetts rule and statute by filing a complaint to the United States District Court on February 5, 1975, requesting that the statute and rule be declared in violation of the Equal Protection Clause, that the orders for payment of attorney's fees be declared null and void, that all payments made (especially under the threat of imprisonment) be refunded, and that damages be assessed against each defendant attorney.

On September 7, 1978 the United States District Court for the District of Massachusetts dismissed petitioners' complaint and did not rule on the constitutionality of the statute and rule, (Appendix A, pp. 2a-9a). The basis for federal jurisdiction in the United States District Court was based upon provisions of 28 U.S.C. 1331, 1343(1), 1343(3), and 1343(4).

Petitioners appealed this order and judgment to the United States Court of Appeals for the First Circuit, which noted that petitioners had appealed "from the judgment of the three-judge court properly convened pursuant to 28 U.S.C. 2281." On November 21, 1978 the United States Court of Appeals for the First Circuit subsequently affirmed sua sponte the judgment of the District Court.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

This Court has never ruled upon the constitutionality of a state statute and rule which requires husbands to pay the wife's attorney's fees in divorce actions, but not the contrary. This Court has heard and resolved other cases involving constitutional questions relating to a state's intrusion into the family setting when that intrusion results in the allocation of burdens along sexually discriminating lines. In Stanley v. Illinois, 405 U.S. 645 (1972), this Court held that the father of an illegitimate child was entitled to the same presumptions in a custody proceeding that would normally be given to a similarly situated mother. Although the majority of the Court treated the issue involved as one of due

process, four Justices held that Illinois violated the Equal Protection Clause when it made assumptions regarding paternal fitness based on gender. Similarly, this Court held in Stanton v. Stanton, 421 U.S. 7 (1975), that a state cannot allocate paternal and marital responsibilities differently with respect to children of different gender. Other gender-based discrimination cases concerning a family or marital setting heard by this Court, challenging the validity of state statutes include Reed v. Reed, 404 U.S. 71 (1971), Kahn v. Shevin, 416 U.S. 351 (1974), and Orr v. Orr, 77-1119 (pending).

In Levy v. Louisiana, 391 U.S. 68 (1968), this Court held that the Louisiana Wrongful Death Act which differentiated between illegitimate and legitimate children was in violation of the Equal Protection Clause because similarly situated children were not given similar causes of action under the statute. In like manner, similarly situated parties in a divorce action in Massachusetts are never given similar treatment, since a woman always has a right of action for an award of attorney's fees, but never a man. Faced with the fact that the challenged statute and rule do not accord men the same rights as similarly situated women, the issue of this petition is whether the discriminatory treatment is justified by important governmental objectives and is substantially related to those objectives.

The Massachusetts Probate Court held in Kramer v. Kramer, #95598, Gilmore v. Gilmore, # 96199, and House v. House, 368 Mass., 120, 1975, that Rule 47 unconstitutionally denied husbands the equal

protection of the laws because it failed to extend to them the same privileges that it granted wives. Although the Massachusetts Supreme Judicial Court reversed in House, saying that Rule 47 did not discriminate on the basis of sex even though the Rule itself did not apply to husbands, no awards had ever been made that a wife pay the husband's attorney's fees in any divorce proceedings in Massachusetts. This fact alone suggests and substantiates that discrimination does indeed exist in the awarding of attorney's fees.

In the United States District Court in Schlichte v. Gay, 73-3111-C, 1974, the magistrate's report states that the Court has found no cases in which a husband has been granted the same rights as the wife under this rule or statute. The magistrate concludes that there is a substantial question with respect to the constitutionality of Probate Rule 47 and Mass. Gen. Laws Chap. 208, Sec.17.

In 1975, the Massachusetts legislature apparently recognized the unconstitutionality and absurdity of Mass. Gen. Laws Chap. 208, Sec. 17, and as a result, they made minor technical amendments to eliminate all reference to sex; however, since petitioners were injured under the old provisions of the statute, these amendments have no bearing on the issues presented in this petition. Nevertheless, even as amended in 1975, Massachusetts General Laws, Chapter 208, Section 17 still unconstitutionally discriminates against the husband as applied.

CONCLUSION

The question presented in this petition is substantial and of public importance, and therefore, requires plenary consideration, with brief on the merits and oral arguments, for its resolution.

Respectfully submitted,

Ralph H. Arabian, pro se

Robert E. Schlichte, pro se

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-8119

RALPH H. ARABIAN, ET AL.,
Plaintiffs, Appellants.,

v.

JOSEPH AYOUB, ET AL.,
Defendants, Appellees.

MEMORANDUM AND ORDER

Entered November 21, 1978

Plaintiffs appeal from the judgment of the three-judge court properly convened pursuant to 28 U.S.C. 2281. In so far as this Court has jurisdiction over the appeal, see 28 U.S.C. 1253, we find plaintiffs' claim without merit. Accordingly, we affirm sua sponte the judgment of the three-judge court under our Rule 12.

So ordered.

By the Court
/s/ Dana H. Gallup
Clerk

(Cert. cc: Clerk, USDC., Mass.; cc: Messrs. Arabian, Schlichte, Kelly, Hurley, Asack, Locke and Hayes.)

APPENDIX A

UNITED STATES DISTRICT COURT

RALPH H. ARABIAN ET AL.,
Plaintiffs,

v.

JOHN J. DALEY ET AL.,
Defendants.

CIVIL ACTION
NO. 75-446-G

JUDGMENT

September 7, 1978

Upon consideration of the complaint, and supporting and opposing memoranda of law, it is ordered and adjudged that the complaint be dismissed for failure to state a claim upon which relief can be granted, Rule 12(b)(6), Fed. R. Civ. P., in accordance with the Memorandum of Decision filed contemporaneously herewith.

/s/ Frank M. Coffin
U.S. Circuit Judge
/s/ W. Arthur Garrity, Jr.
United States District Judge
/s/ Frank H. Freedman
United States District Judge

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

RALPH H. ARABIAN ET AL.,
Plaintiffs,

v.

JOHN J. DALEY ET AL.,
Defendants.

CIVIL ACTION
NO. 75-446-G

MEMORANDUM OF DECISION ON MOTION TO DISMISS

September 7, 1978

GARRITY, J. This case is before the court pursuant to 28 U.S.C. 2281.[1] Plaintiffs claim that the enforcement of Mass. Gen. Laws chapter 208, section 17

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[1] 28 U.S.C. 2281, mandating a three-judge district court in certain circumstances has been repealed with respect to actions commenced after August 12, 1976. See, 90 Stat. 1119 (1976). Plaintiffs, however filed their complaint in 1975, so Section 2281 applies.

(hereinafter, Section 17)[2] and Mass. Probate Court Rule 47 (hereinafter, Rule 47)[3] deny them equal protection of the laws and due process of law in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. 1981,

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[2] At the time the original complaint was filed and prior to the 1975 Amendment, see, note 7, infra, Section 17 read as follows:

> Pendency of libel; allowance; alimony. The court may require the husband to pay into court for the use of the wife during the pendency of the libel an amount to enable her to maintain or defend the libel, and to pay to the wife alimony during the pendency of the libel.

[3] Mass. Probate Court Rule 47 provides:

> An application by a wife for an allowance to enable her to defend or prosecute a libel shall contain a statement that she intends in good faith to defend or prosecute such libel, and shall be accompanied by a certificate of her attorney that he believes such statement to be true. If such allowance is granted, it shall be paid as the court may direct.

1985(3) and 1988.[4] They request declaratory and injunctive relief in addition to damages.

Each of the wives of plaintiffs, husband-parties to divorce libels, through her attorney, applied to the Probate Court pursuant to Section 17 and Rule 47 to require her husband to pay the attorney's fees she incurred in connection with the divorce action. The Probate Court granted several of these applications, and plaintiffs paid the sums rather than face contempt. Plaintiffs now challenge the constitutionality of Section 17 and Rule 47, arguing that both provisions discriminate on the basis of sex by allowing a wife to obtain counsel fees from her husband without according the husband a similar privilege. In addition they object that awarding counsel fees against husbands inhibits them from exercising their right of access to the courts to adjudicate claims arising out of divorce actions.

Defendants each move to dismiss the complaint on several grounds, and these motions are now under consideration by this court. The issues have been thor-

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[4] Plaintiffs also claim violations of 18 U.S.C. 241 and 242 and 28 U.S.C. 2201, 2202, and 2284. These allegations are misplaced. 18 U.S.C. 241 and 242 are criminal statutes, and plaintiffs have no standing to complain of their violation. 28 U.S.C. 2201 and 2202 concern only the availability of declaratory relief. 28 U.S.C. 2284 outlines three-judge court procedures and, like sections 2201 and 2202, confers no substantive rights.

oughly briefed and the applicable law is clear; no purpose would be served by hearing oral argument. After reviewing the parties' briefs and for the reasons outlined in this opinion, we grant defendants' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), since plaintiffs have failed to state a claim upon which relief can be granted. In light of this disposition, it is unnecessary to express any opinion concerning the other grounds urged in support of defendants' motions, viz., plaintiffs' failure to join necessary parties under Rule 19, Fed. R. Civ. P., and plaintiffs' failure to comply with Rule 8, Fed. R. Civ. P. Defendants also assert a lack of subject matter jurisdiction and the absence of an actual controversy between the parties. Although not all the defendants raised all of these arguments, each defendant did maintain that plaintiffs had failed to state a claim upon which relief could be granted.

Subsequent to the filing of the original complaint in this action, the Massachusetts Supreme Judicial Court in House v. House, 1975, 368 Mass. 120, addressed the identical equal protection argument presented by the plaintiffs in the instant case. House involved the denial of a wife's application for counsel fees made at the time of the grant of a decree nisi in her divorce action. The Probate Court judge held that Rule 47, upon which the wife relied, unconstitutionally denied husbands the equal protection of the laws because it failed to extend to them the same privileges that it granted wives. The Supreme Judicial Court reversed, concluding that the statutory scheme governing counsel fees in divorce actions taken

as a whole did not discriminate on the basis of sex. Contrary to the assumption of the probate judge, the court held that Rule 47 conferred no right to counsel fees in divorce cases; it merely specified the requirements that a wife's application must meet. 368 Mass. at 121. Although Rule 47 itself does not apply to husbands, the court found that the same good faith showing must nevertheless be made by a husband seeking counsel fees from his wife. 368 Mass. at 121. Since procedural burdens are identical for both husband and wife, Rule 47 does not discriminate on the basis of sex.

Turning to the question of the Probate Court's power to approve applications for counsel fees, the Supreme Judicial Court held that Mass. Gen. Laws c. 208, sec. 38, grants that authority without regard to the sex of the applicant, even though sec. 17, as it read at the time of the House decision, conferred the same power only in connection with a wife's petition. 368 Mass. at 121-2. The court's interpretation of the statutory scheme avoided the need to decide the constitutional question since the provisions as a whole accorded husbands and wives equal treatment. [6]

[6] In their supplementary memorandum discussing the significance of the House decision, plaintiffs argue that Mass. Gen. Laws c. 261, s. 13 and 23 together limit the counsel fees obtainable in divorce actions to a nominal amount. Section 13, however, expressly states that its cost figures are "in addition to other disbursements allowed by law." Mass. Gen. Laws c. 260, s. 17 and 38, are such "laws" comprehended by this clause, laws that in divorce actions permit fees greater than the nominal amounts specified by Sec 13. See, Fuller v. Trustees of Deerfield Academy, 1925, 252 Mass. 258.

Moreover, after the decision in the House case, Section 17 was amended to eliminate all reference to sex. See, St. 1975 ch. 400, sec. 21. Husbands and wives may now rely on both Sections 17 and 38 to obtain counsel fees from the opposing party. [7]

Plaintiffs also complain that ordering them to pay counsel fees chills them from exercising their right of access to the courts to adjudicate disputes in connection with their divorce actions. Although it is not entirely clear from the complaint, plaintiffs appear to be arguing that because they face the prospect of paying counsel fees into court during the pendency of a libel, they are chilled from making use of the probate courts and thus denied due process of law. See, Boddie v. Connecticut, 1971, 401 U.s. 371. So stated, the claim is completely without merit.

The award of counsel fees pursuant to Mass. Gen. Laws c. 208, s. 17 and 38 is within the discretion of the Probate Court, see, Clifford v. Clifford, 1968, 354 Mass. 545, 549, 238 N.E. 2d 522. In the exercise of its discretion, the court considers, among other factors, the abil-

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[7] Section 17 now reads:

> Pendency of action; allowance; alimony. The court may require either party to pay into court for the use of the other party during the pendency of the action an amount to enable him to maintain or defend the action and to pay to him alimony during the pendency of the action.

ity of each spouse to pay the fees and grants the application only in the event that the applicant is unable to pay his own costs and the opposing party is capable of paying all fees. See, Hano v. Hano, 1977, Mass. App. Adv. Sh. 1085, 1089, 367 N.E. 2d 1190. This situation is quite unlike that involved in Boddie v. Connecticut, 1971, 401 U.S. 371. No party to the instant case is foreclosed from prosecuting or defending a libel because of a fixed, non-waivable access fee. An allegation of a mere chill is insufficient to sustain plaintiffs' due process claim. See, Ortwein v. Schwab, 1973, 401 U.S. 656, U.S. v. Kras, 1973, 409 U.S. 434.

Defendants' motion, therefore, is granted, and plaintiffs' complaint is hereby dismissed.

/s/ W. Arthur Garrity, Jr.
United States District Judge

APPENDIX B

A.C. 7 Div.

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss. Probate Court

Respectfully represents Patricia Marie Arabian of Brockton in the County of Plymouth, the respondent in a libel for divorce that she believes she has a good cause of action and intends in good faith to defend and to use for such defense any allowance made.

Wherefore she prays that Ralph H. Arabian of Framingham in the County of Middlesex, the libellee, may be required to pay into Court for her use a sum to enable her to maintain said libel.

Dated this 23rd day of August 1971.

/s/ Patricia Arabian
Libellant

I believe the above statement to be true.
/s/ Joseph S. Ayoub, Attorney

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss. Probate Court

Ordered that the Libellee pay into Court the sum of eight-hundred dollars; four hundred dollars on or before September 10, 1971, four hundred dollars on or before November 4, 1971 , as an allowance to said libellant.

Said sum may be paid by the Register to the attorney for the libellant.

/s/ James R. Lawton
Judge of Probate Court

Sept. 8, 1971

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

To the Honorable the judge of the probate court in and for the County of Plymouth:

In the matter of petition for modification filed by Ralph H. Arabian of the court order, entered on September 8, 1971 Docket #83290 (sic) Now comes Patricia Marie Arabian, respondent and moves that the petitioner, Ralph H. Arabian, be ordered by the court to pay counsel fees to the respondent, Patricia Marie Arabian in advance so that she may defend this action.

/s/ Patricia M. Arabian

November 13, 1972

Plymouth, ss. Probate Court

The within motion is hereby allowed. Libellee shall pay $200.00 forthwith.

/s/ James R. Lawton
Judge of Probate Court

For respondent:

Joseph S. Ayoub
27 State St.
Boston, Mass. 02109
523-6300

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

To the Honorable the judge of the probate court in and for the County of Plymouth:

In the matter of petition brought by Ralph H. Arabian v. Patricia M. Arabian for modification of court order entered 9-8-71. Now comes respondent, Patricia Marie Arabian and moves that the petitioner, Ralph H. Arabian, be ordered to pay counsel fees for appearance of Attorney Joseph S. Ayoub at a hearing scheduled for Thursday, December 14, 1972 on motion of Ralph H. Arabian to vacate an order requiring him to pay forthwith $200 for costs of taking deposition.

/s/ Patricia M. Arabian

December 8, 1972

Plymouth, ss. January 18, 1973

Counsel fees in the sum of one hundred fifty ($150) dollars for appearance on this date to be paid to Paul P. Hayes, Jr., Esquire.

/s/ Alfred Knight
Acting Judge of Probate Court

For respondent:

Joseph S. Ayoub
27 State St.
Boston, Mass. 02109
523-6300

APPENDIX B

(General Laws Ch. 208, Sec. 17)
A.C. 7 (Divorce)

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss. Probate Court

Respectfully represents Marie C. Schlichte of Quincy in the County of Norfolk the Petitioner in a petition for contempt that she believes she has a good cause of action and intends in good faith to prosecute it and to use for such prosecution any allowance made.

Wherefore she prays that Robert E. Schlichte of Boston in the County of Suffolk, the respondent may be required to pay into Court for her use a sum to enable her to maintain-defend said libel.

Dated this 8th day of August 1973.

/s/ Marie C. Schlichte
Petitioner

I believe the above statement to be true.

/s/ John K. McNabb, Attorney

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss. Probate Court

Ordered that the libellant pay into Court the sum of One Hundred (100) dollars on or before October 1, 1973 as an allowance to said libellant.

Said sum may be paid by the Register to the attorney for the libellant.

/s/ J.J. Fox

Aug. 8, 1973 Judge of Probate Court